PT Pelayaran Era Indonesia Fortune v ZKZ Euphoria Sdn Bhd

HIGH COURT (SHAH ALAM) — SUIT NO BA-22NCVC-68–02 OF 2018
ABD MAJID JC
19 APRIL 2019

Civil Procedure — Setting aside — Judgment in default — Respondent sued appellant for breach of time charter party agreement — Judgment in default of appearance ('JID') entered against appellant — Appellant applied to set aside JID — Senior assistant registrar dismissed appellant's application — Whether failure to file proposed statement of defence fatal — Whether appellant had abandoned their right to arbitration — Whether appellant had meritorious defence

ZKZ Euphoria Sdn Bhd ('the appellant') and PT Pelayaran Era Indonesia Fortune ('the respondent') had entered a time charter party agreement ('TCP 1') where the appellant chartered a vessel from the respondent at USD4,600 per day. The appellant then let the said vessel for USD5,600 per day to Swiber Offshore (India) Pvt Ltd ('Swiber') vide another time charter party ('TCP 2') but Swiber had defaulted in payment amounting to USD442,870.40. The respondent subsequently, without the appellant's consent, made an arrangement with Swiber to make payments directly to the respondent but before making any payment under TCP 2, Swiber went into liquidation. The respondent then filed an action against the appellant for the breach of TCP 1. Judgment in default ('the JID') of appearance was entered against the appellant. The appellant's application to set aside the JID was dismissed by the senior assistant registrar ('the SAR'), hence, the present appeal. In submitting that they had meritorious defence, the appellant averred that: (a) the respondent approached Swiber without their consent and entered into a private arrangement therefore had breached TCP 1; and (b) the dispute over non-payment should be referred to an arbitration in accordance with cl 34(c) of TCP 1.

Held, dismissing the appeal with costs:

(1) The appellant did not file any draft or proposed statement of defence. The appellant however did state their grounds supporting a meritorious defence in the affidavit in support of the application to set aside the JID. Failing to file the draft or proposed statement of defence was not fatal (see para 10).

(2) The appellant never at any time took step to initiate the referral to the arbitration instead in their application to set aside the JID they prayed for an extension of time to file defence. There was not even a prayer to stay

A the proceedings before the learned SAR. Therefore, the appellant could not avail themselves to s 10 of the Arbitration Act 2005 in contending that they had a meritorious defence. They had abandoned their right to arbitration (see paras 15 & 18).

B (3) As regards the private arrangement between Swiber and the respondent, the appellant did not say how TCP 1 was breached nor identified which term or terms that had been infringed or how estoppel would come into play. The terms of TCP 1 were clear that the appellant was obligated to pay for chartering the vessel from the respondent and no such term C providing that the payment depended upon any subsequent similar charter agreement to be entered between the appellant and any other party could be found in TCP 1. Premised on the reasons above, the appellant had no meritorious defence (see para 19).

D **[Bahasa Malaysia summary**

ZKZ Euphoria Sdn Bhd ('perayu') dan PT Pelayaran Era Indonesia Fortune ('responden') telah menandatangani perjanjian catar masa ('PCM 1') di mana perayu menyewa sebuah kapal daripada responden dengan USD4,600 sehari. Perayu kemudian menyewakan kapal tersebut untuk USD5,600 sehari kepada E Swiber Offshore (India) Pvt Ltd ('Swiber') dengan perjanjian catar masa lain ('PCM 2') tetapi Swiber telah gagal membayar dengan bayaran sebanyak USD442,870.40. Responden kemudiannya, tanpa persetujuan perayu, membuat perjanjian dengan Swiber untuk membuat pembayaran secara langsung kepada responden tetapi sebelum membuat sebarang pembayaran di F bawah PCM 2, Swiber telah digulung. Responden kemudian memfailkan tindakan terhadap perayu untuk pelanggaran PCM 1. Penghakiman ingkar ('PI') penampilan telah dimasukkan terhadap perayu. Permohonan perayu untuk mengetepikan PI telah ditolak oleh penolong kanan pendaftar ('SAR'), oleh itu, rayuan ini. Dalam mengemukakan bahawa mereka mempunyai G pembelaan bermerit, perayu menegaskan bahawa: (a) responden mendekati Swiber tanpa persetujuan mereka dan memasuki satu persetujuan peribadi oleh itu telah melanggar PCM 1; dan (b) pertikaian mengenai tidak membayar perlu dirujuk kepada timbang tara mengikut klausa 34(c) PCM 1.

H **Diputuskan,** menolak rayuan dengan kos:

(1) Perayu tidak memfailkan sebarang draf atau pernyataan pembelaan yang dicadangkan. Walau bagaimanapun, perayu menyatakan alasan mereka menyokong pembelaan bermerit di dalam afidavit sokongan I permohonan untuk mengetepikan PI. Kegagalan memfailkan draf atau pernyataan pembelaan yang dicadangkan tersebut tidak fatal (lihat perenggan 10).

(2) Perayu tidak pernah mengambil langkah untuk memulakan rujukan kepada timbang tara sebaliknya dalam permohonan mereka untuk

mengetepikan PI mereka memohon untuk lanjutan masa untuk memfailkan pembelaan. Tiada permohonan untuk kebenaran prosiding di hadapan SAR yang bijaksana. Oleh itu, perayu tidak boleh menggunakan s 10 Akta Timbang Tara 2005 dalam mempertahankan bahawa mereka mempunyai pembelaan bermerit. Mereka telah meninggalkan hak mereka untuk timbang tara (lihat perenggan 15 & 18).

(3) Mengenai persetujuan peribadi antara Swiber dan responden, perayu tidak mengatakan bagaimana PCM 1 dilanggar atau tidak mengenalpasti terma atau terma-terma yang telah dilanggar atau bagaimana estoppel akan mempunyai kesan. Terma-terma PCM 1 adalah jelas bahawa perayu diwajibkan untuk membayar sewa kapal daripada responden dan tiada terma yang menyatakan bahawa pembayaran itu bergantung kepada apa-apa perjanjian carter yang serupa yang akan dimasukkan antara perayu dan mana-mana pihak lain boleh didapati di PCM 1. Berdasarkan sebab-sebab di atas, perayu tidak mempunyai pembelaan bermerit (lihat perenggan 19).]

Notes

For cases on judgment in default, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8798–8804.

Cases referred to

Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2018] MLJU 2117; [2019] 1 CLJ 305, FC (refd)

Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors [2012] 4 MLJ 573; [2012] 4 MLRA 178, CA (distd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312; [1993] 1 MLRA 642, SC (refd)

Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd [1999] 2 MLJ 529, CA (refd)

Lee Hee Hong v Eon Bank Bhd (now known as Hong Leong Bank Bhd) [2014] 5 MLJ 808, CA (folld)

Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67, HC (refd)

Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)

Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625, FC (refd)

Usahabina v Anuar bin Yahya [1998] 7 MLJ 691, HC (refd)

Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by the Arbitration Act 2005) s 6
Arbitration Act 2005 ss 10, 10(1), 23

Kamaruzaman Arif (Sahfi Othman with him) (Wan Shahrizal, Hari & Co) for the appellant.
Teoh Qiu Li (Peter Ling & Van Geyzel) for the respondent.

Abd Majid JC:

[1] The appellant's application to set aside the judgment in default of appearance entered against them was dismissed by the learned senior assistant registrar and they appealed against the said decision. Having heard the arguments, I have dismissed their appeal with costs.

[2] In their application to set aside the judgment in default ('JID') the appellant pleaded that the failure to enter the memorandum of appearance was attributed to the company secretary's failure to inform them of the receipt of the writ and the statement of claim. The appellant claimed that they only came to know about this suit when they received a letter from the respondent's solicitors dated 3 April 2018. Nevertheless, the appellant did not complain that the JID was irregular but that they have a good defence to the said action.

BACKGROUND FACTS

[3] Both the appellant/defendant and the respondent/plaintiff have entered a time charter party agreement on 16 December 2015 ('TCP 1') where the appellant chartered a vessel known as Era Maritim from the respondent at USD4,600 per day. Thereafter the appellant in turn let the said vessel to Swiber Offshore (India) Pvt Ltd ('Swiber') by entering into another time charter party agreement with Swiber on 31 December 2015 ('TCP 2') for a period of 60 days. Under TCP 2, Swiber would pay the appellant USD5,600 per day. Subsequently, however Swiber had fallen into arrears amounting to USD442,870.40 which resulted in the appellant failing to pay the respondent under TCP 1. The respondent, without the appellant's consent, has made arrangement with Swiber to make staggered payments directly to the respondent. In October 2016 Swiber went into liquidation before making any payment under TCP 2.

[4] The appellant took exception to the conduct of the respondent in making private arrangement with Swiber and claimed that this has caused Swiber not making any payment under TCP 2 to the appellant.

[5] The respondent in response alleged that the appellant was aware of the

suit filed for the breach of TCP 1 based on the exchanges of emails (exh 'IK7') of encl 12. The Suit BA-22NCVC-68–02 of 2018 was filed on 20 February 2018 and the appellant quoted this suit number in the email dated 6 March 2018. Thus, the assertion that they had knowledge of the suit only in April 2018 was a blatant lie. The respondent further averred that Swiber was not privy to TCP 1 and there was nothing in TCP 1 which prevented the respondent from approaching Swiber for the payment. It was also a fact that Swiber never paid the appellant from the very beginning. As far as TCP 1 was concerned the appellant was obligated to pay the respondent.

SUBMISSIONS

[6] Learned counsel for the appellant rightly submitted that the appellant need to show that they have a meritorious defence since they did not dispute that the JID was obtained regularly. In this respect, they need to demonstrate that there were arguable or triable issues. He pointed out that the respondent from the outset was aware that the vessel would be chartered to Swiber and knew that Swiber failed to make any payment for the hire. The respondent filed the action in the lower court only after they realised Swiber was not able to meet the arrangement made after Swiber went into liquidation. The private arrangement was made without the consent of the appellant who was the contracting party with Swiber. This, according to learned counsel for the appellant constituted a breach of TCP 1 and should be resolved by way of arbitration as provided by cl 34(c) of TCP 1. It was submitted therefore, that apart from having a good defence, they have an arguable case in that the respondent had wrongly pursued the dispute by filing the suit as any dispute arising from TCP 1 should be referred to arbitration. Hence, it was not proper for the respondent to recover the payment under TCP 1 by filing this suit in court. In support of this contention, learned counsel referred to *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1 where it was held that the parties were bound by the agreement if such agreement contains an arbitration clause.

[7] Learned counsel for the respondent submitted that the appellant in applying to set aside the JID did not file any proposed or draft statement of defence and therefore depriving the court the opportunity to consider whether their defence has merits and cited *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67 and *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112.

[8] It was further argued that there was nothing objectionable for them to approach Swiber to claim for the outstanding payment. As regards the arbitration clause, learned counsel contended that the issue was over

non-payment which the appellant did not dispute that they owed the respondent under TCP 1. And this has nothing to do with disputes which should be adjudicated by an arbitrator. In relation to this the appellant had applied for an extension of time to file their defence and took no steps to refer to the arbitrator thus, had taken a step in the proceedings. In doing so the appellant had elected to abandon the right to arbitration. He referred to *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 and s 10 of the Arbitration Act 2005.

DECISION

[9] In contending that they have a meritorious defence the appellant averred that:

> 1.1 the Respondent approached Swiber without their consent and entered into a private arrangement therefore has breached TCP 1; and
>
> 1.2 the dispute over non-payment should be referred to an arbitration in accordance with clause 34(c) of TCP 1.

[10] The Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 at p 321; [1993] 1 MLRA 642 at p 648 Hj Mohd Jemuri bin Serjan CJ (Borneo) held as follows:

> In our view, in order to succeed in his application under these orders the applicant must show that he has a defence which have some merits and which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence there is no defence and the application must fail.

Here, the appellant did not file any draft or proposed statement of defence. The appellant however did state their grounds supporting a meritorious defence in the affidavit in support of the application to set aside the JID. Failing to file the draft or proposed statement of defence is not fatal as I found support in *Lee Hee Hong v Eon Bank Bhd (now known as Hong Leong Bank Bhd)* [2014] 5 MLJ 808 where the Court of Appeal proceeded to consider the fourth defendant's averments in his affidavit to examine whether his defence had merits despite the fourth defendant did not file any proposed or draft statement of defence.

[11] Clause 34(c) of TCP 1 provides as follows:

> This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

Subsection 10(1) of the Arbitration Act 2005 provides as follows: A

> A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. B

[12] This provision was considered by the Federal Court in *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2018] MLJU 2117; [2019] 1 CLJ 305 and at p 324 Abu Samah Nordin FCJ had this to say: C

> It is now mandatory for the court to stay the proceedings in respect of a matter which is the subject matter of an arbitration agreement where a party makes an application under s 10 of the Arbitration Act 2005, before taking any other steps in the proceedings, and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. D

The effect of this pronouncement has modified the repealed s 6 of the Arbitration Act 1952 in respect of the discretion of the court whether or not to refuse the stay unless the court finds that the agreement is null and void, inoperative or incapable of being performed. E

[13] In *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691 the defendant entered an unconditional appearance but failed to file his defence despite an extension of time was allowed for him to do so. As a result of that a judgment in default was entered against him. Ten days later he wrote to the plaintiff stating that the matter should have been referred to the arbitration and he then applied to set aside the default judgment and applied for a stay. Augustine Paul J (as he then was) at p 704 held as follows: F

> It must be observed that when a writ is served on a person in respect of a contract with an arbitration clause in it he has to elect whether he will allow the action to go on or avail himself of the arbitration clause. The filing of an unconditional appearance means that he has elected to allow the action to go on and has accordingly submitted to the jurisdiction of the court. This amounts to a step in the proceedings. G H

And further down after considering several authorities His Lordship said:

> It cannot be argued that the entry of unconditional appearance by the defendant was done for the purpose of merely preventing any order being made against him. In that event the proper course for the defendant to have done would have been to enter conditional appearance. It is therefore my view that the entry of unconditional appearance amounts to the taking of a step in the proceedings within the meaning of s 6. I

[14] *Usahabina* was approved by the Court of Appeal in *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 and later in *Sanwell Corp* at pp 631–632 Mohtar Abdullah FCJ speaking for the Federal Court said as follows:

> At this juncture, we note the existence of one salient fact in *Usahabina* which was mentioned in passing by the learned JC, but unfortunately not properly appreciated by him. It is this fact. In that case, the defendant who had entered an unconditional appearance failed to file his defence within the time limited for doing so. He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. Pausing here for a moment, what the defendant did was clearly a step in the proceedings within the meaning of s 6 of the Act by requesting an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration (see *Ford's Hotel Co v Bartlett* [1896] AC 1). As the defendant failed to file the defence within the extended period, the plaintiff entered judgment in default. It was only after judgment in default was entered that the solicitors for the defendant drew the attention of the solicitors for the plaintiff to the arbitration clause in their contract document, and consequently, gave notice that the defendant wished for the dispute to be referred to the arbitrator. After the defendant had received a copy of the judgment in default, he filed a summons in chambers praying for an order, inter alia, that:
>
> (a) the judgment in default be set aside;
>
> (b) the matter be stayed and/or referred to an arbitrator;
>
> (c) alternatively, he be allowed to bring in a third party to the proceedings;
>
> (d) alternatively, he be allowed to file his defence and counterclaim.
>
> While the learned JC correctly noted that in substance, the application of the defendant was primarily to have the judgment set aside and consequently for the case to be stayed pending reference to arbitration or, alternatively, for leave to be allowed to file his defence and other relevant documents, the learned JC erred in failing to take into account that the defendant had gone a step further than the entry of an unconditional appearance in that, as hereinbefore mentioned, he had requested an extension of time to file his statement of defence. The defendant's belated attempt to resort to arbitration was an afterthought after judgment in default had been entered against him. It must be noted in passing that the alternative prayers (c) and (d), ie that he be allowed to bring in a third party to the proceedings and that he be allowed to file his defence and counterclaim, would also indicate his intention to continue with the proceedings in the High Court. These actions, as prayed, could arguably constitute additional steps in the proceedings taken by the defendant which would negate his belated wish to return to arbitration. Having indicated his election to allow the proceedings to go on in the High Court by applying for the extension of time to file his defence, and after having failed to do so within the extended time, it was too late in the day for the defendant to revert to arbitration after abandoning his right to do so.
>
> In this context, *Usahabina* was a case of the defendant taking more than one step in the proceedings, ie one step in filing the unconditional appearance and another step by applying for the extension of time, clearly indicating an intention to go on with

the proceedings instead of asserting his right to arbitration. Even if the first step was not a step in the proceedings as envisaged by s 6 of the Act, the second step certainly was. The situation is worse if one takes into account the two alternative prayers in his summon in chambers.

[15] Section 23 of the Arbitration Act 2005 provides as follows:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent.

The appellant never at any time took step to initiate the referral to the arbitration instead in their application to set aside the JID they prayed for an extension of time to file defence. There was not even a prayer to stay the proceedings before the learned SAR.

[16] The words 'step in the proceedings' in s 6 of the repealed Act 1952 have been substituted with the words 'taking any other steps in the proceedings' in s 10 of the current Act 2005. In *Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLJ 573; [2012] 4 MLRA 178 it was held that the meaning of the two phrases remains the same. Hence *Usahabina* and *Sanwell* are still good law. Jeffrey Tan JCA (as he then was) pp 581 (MLJ); pp 183–184 (MLRA) said as follows:

Whether an action amounts to a step in the proceedings is determined by the nature of the action and whether it indicates an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration. An application is not a step in the proceedings, if it does not express the willingness of the defendant to go along with the determination of the courts instead of arbitration. A defendant who has specifically stated in the application or supporting affidavit that he intends to seek a stay is not estopped from asserting his right to invoke arbitration. An application, which is made in the event that the specific application for a stay is unsuccessful, is not a step in the proceedings.

The appellant there in the affidavit clearly said that they asked for a stay of proceedings and in the event the stay was not allowed, they be allowed to file their defence and reserved their right to refer the dispute to arbitration.

[17] In contrast, the appellant in this appeal in their notice of application sought for:

(a) the JID dated 28 March 2018 be set aside;

(b) the defendant be granted an extension of time to file defence within seven days from the date of this order, if allowed;

(c) costs to be borne by the defendant; and

(d) other reliefs which the court deems fit and just.

And in their affidavit in support (encl 12) affirmed by the director averred the following:

> 17. Menurut Klausa 34(c) Perjanjian TCP tersebut sebarang pertikaian yang timbul hasil atau berkaitan dengan Perjanjian TCP tersebut mesti dirujuk ke timbangtara yang dipersetujui oleh kedua pihak. Dalam keadaan ini Plaintif yang telah sedia maklum berkenaan pertikaian atas tuntutannya oleh Defendan gagal untuk merujuk pertikaian tersebut kepada timbangtara sepertimana yang diperuntukkan oleh Perjanjian TCP tersebut.

In their affidavit (encl 14) replying to the respondent's affidavit in reply, the director averred the following:

> 7. Saya sesungguhnya menyatakan bahawa isu yang perlu dibawa ke timbangtara bukan atas isu tuntutan Plaintif sebaliknya atas isu samada Plaintif kini diestop dari menuntut terhadap Defendan setelah Plaintif telah berhubung secara terus dengan pelanggan Defendan yang mana fakta ini tidak dipertikaikan oleh Plaintif.

[18] They made no application to stay the proceedings nor expressed their unwillingness to participate in the proceedings. The facts in *Comos* are clearly distinguishable. Therefore, the appellant could not avail themselves to s 10 of the Arbitration Act 2005 in contending that they have a meritorious defence. They had abandoned their right to arbitration.

[19] As regards the private arrangement between Swiber and the respondent, the appellant did not say how TCP 1 was breached nor identified which term or terms that had been infringed or how estoppel would come into play. The terms of TCP 1 were clear that the appellant was obligated to pay for chartering Era Maritim from the respondent and no such term providing that the payment depended upon any subsequent similar charter agreement to be entered between the appellant and any other party could be found in TCP 1. Premised on the reasons discussed above I found that the appellant has no meritorious defence and agreed with the decision of the learned SAR in dismissing the application to set aside the JID. The appeal was therefore dismissed with costs.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar